No. 12,032

IN THE

United States Court of Appeals

For the Ninth Circuit

BAXTER CREEK IRRIGATION DISTRICT and W. COBURN COOK, Trustee for the Creditors of Baxter Creek Irrigation District,

Appellants,

vs.

STATE OF CALIFORNIA and FISH AND GAME COMMISSION OF CALIFORNIA,

Appellees.

BRIEF FOR APPELLANTS.

W. COBURN COOK,
Berg Building, Turlock, California,
Attorney for Appellants.

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JURISDICTIONAL FACTS AND PLEADINGS

The jurisdiction of this court in this appeal is under Sections 24 and 25 of the Bankruptcy Act of 1898 as amended June 22, 1938.

The proceeding in which this cause arose was one for the composition of the debt of the Baxter Creek Irrigation District, an irrigation district organized under the provisions of "the California Irrigation District Act" of the State of California approved March 31, 1897 and acts amendatory thereof. The proceeding was authorized under the provisions of Chap-

ter IX of the Bankruptcy Act of 1898 (11 U.S.C.A., Secs. 401-404).

A former appeal was taken in the same bankruptcy proceeding and numbered 11,632. The transcript of record in the former appeal contains the various pleadings and proceedings that were had in the bankruptcy court leading up to the entry of the interlocutory decree, and reference thereto will be made as occasion may require by referring to the page of the record in case No. 11,632.

The transcript of record in the former appeal is specifically made a part of the record here by order of this court (R. 58).

The Baxter Creek Irrigation District as the petitioner in the bankruptcy proceeding filed its petition for confirmation of its plan of composition September 17, 1945 (R. 2, 9, case No. 11,632). It is one of the appellants here, and the other appellant was designated and appointed trustee for the creditors by the District Court by the interlocutory decree entered January 3, 1946 (R. 60, case No. 11,632), and he was directed to carry out the terms of the plan of composition.

The appellees are the State of California and the Fish and Game Commission of the State of California, who were the applicants for an order made subsequent to the entry of the interlocutory decree. This application was for the cancellation of an assessment and to exclude the lands of the state from the plan of composition. The order was granted July 9th, 1948 (R. 47). From this order the pending appeal was taken.

Notice of the entry of the order was dated July 22nd, 1948 (R. 48) and filed July 23, 1948. The notice of appeal was dated July 30, 1948 and filed August 19, 1948 (R. 49).

The appeal thus was taken within thirty days after the giving and filing of the notice of the entry of the order.

STATEMENT OF THE CASE.

As stated above this appeal arises out of the bankruptcy composition. The petitioner, the Baxter Creek Irrigation District, is a public corporation of the State of California, and the basis of the plan of composition was an agreement which had been entered into between the irrigation district and the trustee, appellant here. The agreement was made August 28, 1945 (R. 62, case No. 11,632). On January 3, 1946 Judge Martin I. Welsh entered an interlocutory decree confirming the contract as a plan of composition (R. 50, 61, case No. 11,632).

The composition agreement recited that the debts of the district consisted of $511,000 of interest bearing bonds, plus interest, and $52,220.93 principal amount of warrants (R. 62, 63, case No. 11,632). The essential provision of the composition agreement was that the landowners should individually be entitled to redeem their respective parcels of land at stated figures as set forth in an exhibit called Exhibit "B" (R. 65, case No. 11,632) or failing to make such optional payment prior to April 24, 1947, the district

would undertake to acquire title to all such unredeemed land and convey the same to the trustee, together with other assets (R. 70, 71, 73, case No. 11,-632). It should be understood and it will plainly appear from the composition agreement and the interlocutory decree that the so-called redemption figure being the amount for which the individual landowner concerned could redeem his land was not an "assessment" and was not in any way levied upon the particular lands involved. The plan of composition merely undertook to give each landowner an *option* to redeem his land from any past or future assessments for the indebtedness of the district upon paying the designated sum.

So far as the plan of composition is concerned, the land of the landowners may or may not have been encumbered with assessments.

Prior to the making of the plan of composition and prior of course to the entry of the interlocutory decree, the State of California acquired certain lands within the boundaries of the Baxter Creek Irrigation District (described at R. 5) by deed dated June 13, 1944, approved by the Director of Finance of the State of California August 28, 1944, and recorded November 14, 1944 in the records of Lassen County (R. 12).

The Fish and Game Commission was noted as the owner of this particular land in the plan of composition and in the interlocutory decree (R. 2, 3, 44).

The property of the state in question was acquired from Dakin Bros. (R. 18-20).

The assessment which had been levied by the Baxter Creek Irrigation District against these lands was $52,839.12 (R. 36). On the other hand, the composition figure, that is to say the figure for which the state could redeem these lands under the composition plan was $885.28 (R. 44).

The court in the bankruptcy proceeding specifically found that notice had been given to all the landowners as provided by the national bankruptcy act (R. 30, case No. 11,632).

The Order to Show Cause.

The State of California on January 13, 1947, applied to the court for an order to show cause, directed to the Baxter Creek Irrigation District and the trustee for creditors, why the land of the state should not be excluded from the operation of the plan of composition, and why the assessment levied should not be declared null and void (R. 4). The order to show cause applied for was issued on the same day by Judge Roger T. Foley of the U. S. District Court, and the application was submitted upon a stipulation of facts (R. 12, 34, 37).

The court below by its order dated and entered July 9, 1948, ordered "that the petition of the State of California be granted, that the land owned by it is excluded from the effect of the Interlocutory Decree of January 3, 1946, and the February 6, 1945, assessment levied thereon is declared to be null and void" (R. 47).

It is from this order that the appeal is taken.

Resume of the Stipulation of Facts.

A brief resume of the stipulation pertaining to the facts so far as pertinent is as follows:

The State of California acquired the land by deed dated June 13, 1944, recorded November 14, 1944 (R. 12).

The Board of Supervisors of Lassen County, California, passed a resolution in September, 1943, for the preparation of an assessment roll of the lands of the Baxter Creek Irrigation District. This resolution (R. 21) recited that a judgment was rendered by the United States District Court in favor of Pueblo Trading Co. against Baxter Creek Irrigation District for a sum of money, the judgment further providing that the Baxter Creek Irrigation District make provision for the payment of the judgment by levying assessments, and that upon the failure of the board so to do the Board of Supervisors of Lassen County should make such provision, whereupon the supervisors resolved to make the levy for the fiscal year 1943-1944 (R. 23). The levy was made for the judgment in the amount of $43,542.16 and all outstanding bonded indebtedness in the amount of $1,062,880.00. Notice that the assessment so made would become delinquent on February 28, 1944 was published (R. 13). This particular assessment roll *did not* include the lands of the State of California in question.

The judgment of the Pueblo Trading Co. referred to was entered March 20, 1940 in case No. 4195L (R. 14). The district had not levied any assessments against the lands of the district for payment of its

bond debt since 1927 (R. 15). The supervisors appeared in court and promised the court that they would levy an assessment and pursuant to their promise proceeded to make a levy upon certain lands. But the assessment so levied did not include the lands owned by the State of California. (These lands formerly were assessed to Dakin Bros. and so appeared on the assessment roll of the county (R. 15).) Plaintiff Pueblo Trading Co. applied to the court in September, 1944 for an order to compel the board of supervisors to levy an assessment upon these lands which had been omitted as well as other omitted lands, and on September 26, 1944 the board of supervisors were directed by the court to prepare a supplemental assesment roll and to proceed to make such levy (R. 16). Notice was accordingly published in December that a supplemental assessment roll had been prepared and that the supervisors would meet January 2, 1945 as a board of equalization (R. 16).

The land in question had been acquired by the state in August, 1944.

After the roll had been equalized the Board of Directors of the Baxter Creek Irrigation District, whose duty it had always been to make this assessment, proceeded to make the actual levy (R. 17, 25).

Subsequently notice was published that this real property would be sold unless the assessment should be paid prior to May 21, 1945 (R. 17). It will be observed that the delinquent tax list (R. 35) states plainly "Levied in the year 1944". The amount of the assessment required to be paid as shown by this

exhibit is $52,839.12 (R. 36). The resolution of the district dated July 2, 1946 (R. 41) shows again that the assessment purports to be an assessment "levied by the District in 1944".

Resume of Dates.

Proceedings for assessment commenced by supervisors December, 1944; assessment actually levied by board February 6, 1945; property acquired by state August, 1944. Interlocutory Decree entered January 3, 1946; application for order to show cause January 13, 1947.

SUMMARY OF ARGUMENT.

The court made two rulings. It ruled: 1. That the lands of the state were not subject to the plan of composition; 2. Declared the assessment levied by the board of directors of the district null and void.

This order was based in part upon an erroneous finding and assumption that "By the (interlocutory) decree the State of California through the Fish and Game Commission was assessed the sum of $885.28." and in part upon an error in law in that the court determined that the assessment levied February 6, 1945, did not become a lien upon the lands until the following March, 1945, instead of holding, as we maintain, that it became a lien the First Monday in March, 1944.

As has been shown by the foregoing statement of the case, the actual assessment was not levied by the

interlocutory decree nor was it in the amount of $885.28, but the assessment was levied by the Board of Directors of the Baxter Creek Irrigation District and was in the amount of $52,839.12. It is our contention that the matter of the plan of composition became *res judicata* and that the time for appeal having elapsed and the Fish and Game Commission having been duly notified as shown by the record, could not a year later apply to the court for an order modifying the decree.

It is also contended that the court has no jurisdiction to declare void an assessment levied by the State of California through its public agency Baxter Creek Irrigation District, unless perchance it should have undertaken to do so in the case in which it ordered the assessment made, that is, the *Pueblo Trading Co.* case. This it did not do.

And we maintain that the court has made an error of law in construing the provisions of the Water Code in such a manner as to provide that the assessment finally levied in February, 1945 did not become a lien until the following March.

We maintain also that the decree takes the property of the creditors of the district without due process and without just compensation.

ARGUMENT.

I. THE COURT ERRED IN FINDING AND HOLDING THAT THE BANKRUPTCY COURT HAD ASSESSED THE LANDS OF THE FISH AND GAME COMMISSION IN THE SUM OF $885.28.

The assessment made upon the lands was made by the Baxter Creek Irrigation District as the result of an order in the case of *Pueblo Trading Co. v. Baxter Creek Irrigation District,* and was made February 6, 1945, and was in the amount of $52,839.12 (R. 36).

The interlocutory decree provided "That said Plan of Composition attached to the Petition herein as modified in Finding XIX and paragraph 14 of this decree be and it is hereby approved, confirmed, adopted, and allowed * * *" (R. 55, case No. 11,632). Paragraph 14 which is found at R. 55, case No. 11,632, clearly shows that the item referred to is not an assessment, and the plan of composition itself plainly says "That the said Trustee * * * will accept from any individual landowner in the District in full settlement of the liability of such land for the payment of all the outstanding bonds, coupons and warrants of said District and judgments thereon against said District, the amount set forth in Exhibit 'B' and labeled 'Total Amount' opposite the description of such land * * *" (R. 65, case No. 11,632).

It is apparent that the court erred in holding that the interlocutory decree levied any assessment in the amount of $885.28, or in any other amount.

II. THE APPLICATION OF THE STATE WAS TOO LATE.

The interlocutory decree was entered January 3, 1946 (R. 61, case No. 11,632). The application for the order to show cause was made January 13, 1947 (R. 5). We have shown that the Fish and Game Commission had due notice of the hearing on the interlocutory decree (R. 30, case No. 11,632), and that no objection thereto was made. The time for appeal had expired (Sec. 24, Bankruptcy Act 1898).

The application of the state was therefore too late. It was bound by the decree.

III. THE COURT WAS WITHOUT JURISDICTION TO DECLARE NULL AND VOID THE ASSESSMENT OF FEBRUARY 6, 1945, AND ITS ORDER IN THAT RESPECT WAS AN INTERFERENCE WITH THE SOVEREIGNTY OF THE STATE OF CALIFORNIA.

The assessment which we refer to is the one made February 6, 1945 by the Board of Directors of the Baxter Creek Irrigation District and which was in the amount of $52,839.12.

Chapter IX of the Bankruptcy Act specifically provides:

> (i) Nothing contained in this chapter shall be construed to limit or impair the power of any state to control, by legislation or otherwise, any municipality or any political subdivision of or in such State in the exercise of its political or governmental powers, including expenditures therefor."—11 U.S.C.A. 403 (i).

U. S. v. Bekins, 304 U. S. 27, 58 S. Ct. 811.

IV. THE ORDER OF THE COURT CONSTITUTES THE TAKING OF THE CREDITORS' PROPERTY WITHOUT DUE PROCESS AND WITHOUT JUST COMPENSATION.

The composition contract in this case was an agreement between the creditors and the district and landowners by which the creditors agreed to surrender their bonds totaling in value over a million dollars on consideration of the various landowners paying the assessment. To take the Fish and Game Commission out of the plan of composition thus diminishes the amount received by the creditors. Furthermore, the declaration that the assessment made by the Board of Directors of the Baxter Creek Irrigation District without regard to any clauses in the composition agreement permitting the correction of errors takes the property of the creditors without due process of law and without just compensation. We submit the court erred, but the farthest the court should have gone in any event was to declare that the Fish and Game Commission was no part of the composition proceeding, but to go back and declare that the assessment made by the Board of Directors was null and void was an invasion of the creditors' rights, if the other part of the order was not such invasion.

We do not think it is at all clear that an irrigation district cannot tax property of another state agency. There are several reasons for this: (a) The provision in the constitution relating to taxation does not refer to assessments. (b) An irrigation district is another agency of the state. (c) There is a contract between the state and the bondholders for the payment of the bonds.

Under the provisions of the California Irrigation District Act the bonds are payable out of assessments levied against the the lands. This bond is a contract between the state and the lenders of the money. The bond has the great seal of the state upon it and it is certified as approved by the state for investment by savings banks and the like and may be used in many cases to satisfy the public obligation to post a bond. It is in effect a debt of the state payable out of assessments levied upon certain land. The state cannot now void its own obligation, but in particular it cannot wipe out the lien of the assessment which lien became effective the first Monday in March 1944.

Taxes and assessments are two different things. This is shown by Political Code Section 3456 (a) where it is provided that assessments levied by a reclamation district shall include all lands owned by the State of California or by any city, county, etc. If assessments and taxes were the same this section of the Political Code would be unconstitutional.

In *A. T. & S. F. Railway Co. v. Reclamation Dist. No. 404,* 173 Cal. 91, 92, it is said:

> "Assessments of the kind here involved do not have the character of a tax so as to be collectible by execution or levy upon the general property of the owner of the land against which the assessment is made. Such assessments may be made upon the particular property because the improvement to be made with the money raised in that manner is presumed to benefit the property assessed to an amount at least equal to the charge against it * * * That such a charge imposed by

a local public corporation of that character is an assessment and not a tax was directly decided in San Diego v. Linda Vista I. D., 108 Cal. 193 (35 L.R.A. 33, 41 Pac. 291)."

In *Los Angeles Co. F. C. Dist. v. Hamilton,* 177 Cal. 119, 129, the court stated:

"* * * In Doyle v. Austin, 47 Cal. 353, an act (Stats. 1871-72, p. 911), providing for the opening of Montgomery Avenue, in the City of San Francisco, was assailed upon the ground, among others, that it imposed a 'tax' in a special improvement district without following the provisions of the constitution with reference to the assessment and levy of taxes. The court answered the contention in these words: 'It sufficiently appears on the face of the act that the whole scheme contemplates an assessment and not a tax. The two are essentially different in their nature, and designating as a tax that which in its elements is an assessment can have no effect in determining whether it is one or the other. The question must be decided by the nature of the imposition, and not by the mere name by which it is called.' There are many other instances where the word 'tax' has been used to designate a special assessment. (Wagner v. Baltimore City, 239 U.S. 207 (60 L. ed. 230, 36 Sup. Ct. Rep. 66); Yeatman v. Crandall, 11 La. Ann. 220; Daily v. Swope, 47 Miss. 367.) * * *"

In *Hagar v. Sup. of Yolo Co.,* 47 Cal. 222, 234, it is said:

"* * * In my opinion the act in question violated none of these provisions, and the authority to compel local improvements at the expense of those

to be immediately benefited, is not taxation, though referable to the taxing power."

In *Boxler v. County of Sacramento,* 59 Cal. 698, 702, the court said:

"* * * 'Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for State and municipal purposes, and governed by principles that do not apply generally.' (Cooley on Taxation 416-417.) These assessments are made for local improvements, such as grading streets, constructing sewers therein, draining swamps, marshes, and other low lands for stagnant water, etc., and the principle upon which they are levied is 'that the territory subjected thereto will be benefited by the work.' (Litchfield v. Vernon, 41 N.Y. 133.)"

In *Turlock Irr. Dist. v. Williams,* 76 Cal. 360, 370, it is stated:

"The nature of the assessment is one for local improvements, which, however, eventuate in the advancement of the public good, and such assessments and collections can be lawfully made.

"It is 'clear that those clauses of the constitution which provide that taxation shall be equal and uniform, and which prescribe the mode of assessment, and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements'. (Hagar v. Supervisors of Yolo County, 47 Cal. 222.)"

In *In re Orosi Public Utility Dist.,* 196 Cal. 43, 53, the court said:

"* * * The other distinguishing feature is that the exactions which such districts may enforce in order to carry out their purposes are in the nature of assessment or taxes for local benefits, to be spread on the property in the districts in proportion to the peculiar advantage accruing to each parcel from the improvement. (Pasadena Park Imp. Co. v. Lelande, 175 Cal. 511, 512 (166 Pac. 341).) Such an exaction is generally in the form of a special assessment, but even if it is in the form of a tax it is nevertheless an assessment for local benefit. (City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 193 (41 Pac. 291).)"

In *State v. Board of Commissioners of Cascade County* (*Mont.*), 296 Pac. 1, 14, the court said:

"The impositions imposed upon the land within an irrigation district for the purpose of irrigating the lands therein are special assessments.

"We hold, therefore, that irrigation district assessments are not taxes, as that term is used in section 2215.

"The only justification for these added impositions is the benefit accruing to the lands upon which the added burden is placed." (Authorities)

"The theory upon which the assessments may be levied for special improvements is 'that the property assessed will be enhanced (in value) to the extent of the burdens imposed'."

In *Oregon Shortline Railroad Co. v. Pioneer Irr. Dist.,* (Ida.), 102 Pac. 904, 915, the court said:

"The principle involved in assessments for local improvements is different from that underlying

general taxation. The organization of the district, in the first instance, was intended for local improvement, and the assessment levied is for the purpose of carrying out the local improvement; and we do not understand the rule to be that the general method of fixing values and making assessments against property for general tax purposes applies to levies made for local improvements."

In *Interstate Trust Co. v. Montezuma Valley Irr. Dist.,* (Colo.), 181 Pac. 123, 124, the court said:

"* * * Indeed, it appears that the courts of all jurisdiction which have passed upon irrigation district laws have either expressly or by necessary implication held the assessments levied thereunder to be local improvement taxes.

"Plaintiff contends, however, that irrigation district assessments, being levied annually throughout the life of the district, are for that reason inconsistent with the theory that the taxes are for local improvement. From a legal viewpoint this circumstance does not affect the character of the assessments. The difference between the assessments for the paving of streets and one for the irrigation of land is physical and not legal. In the first instance the result is accomplished and the benefits conferred when the paving is completed; in the second, in order to render the benefit a continuing one the assessment in the very nature of things must also be continuous. But this fact cannot be held to change that which is in fact a local improvement assessment into a general tax."

Public property may be assessed.

In *City of Pasadena v. Chamberlain,* 1 Cal. App. (2d) 125, 132, (hearing by Supreme Court denied), the court said:

> "* * * As the court observed in Inglewood v. County of Los Angeles, 207 Cal. 697: 'There is a broad and well recognized distinction between a tax levied for general governmental or public purposes and a special assessment levied for improvements made under special laws of a local character * * * While these local assessments are taxed under a taxing power, they are not taxes in the ordinary understanding of that term; * * * ; consequently, the usual exemptions from taxation will not preclude the property exempt being subject to them.' "

In *San Diego v. Linda Vista Irr. Dist.,* 108 Cal. 189, 194, 196, it is said:

> "It cannot be doubted, in view of the well-recognized distinction between a tax and an assessment, not only in common parlance, but in repeated decisions of this court prior to the adoption of the constitution of 1879, that if it had been intended to restrict the power of the legislature in regard to assessments for local purposes, or that the proviso contained in section 1 of Article XIII should extend to assessments as well as 'taxation', that apt words to express such intention would have been used. If this be true it follows that there is at least no express exemption of any property from local assessments, while the act under which said irrigation district was organized provides for an annual assessment upon

the real property of the district; 'and all the real property in the district shall be and remain liable to be assessed for such payments, as hereinafter provided'. (Stats. 1887, sec. 17, p. 37).

"In Cooley on Taxation, second edition, page 650, in speaking of property subject to assessment, the learned author says:

"'It has been shown in another place that, while these local assesments are laid under a taxing power, they are not taxes in the ordinary understanding of that term, and that, consequently, the usual exemptions from taxation will not preclude the property exempted being subjected to them.' And at page 653 the same author adds: 'Even public property is often subjected to these special assessments; there being no more reason to excuse the public from paying for such benefits than there would be to excuse from payment when property is taken under the eminent domain.'"

In *Conley v. Hawley,* 2 Cal. (2d) 23, 26, the court said, quoting with approval from California Jurisprudence:

"While local assessments are made under the taxing power, they are not taxes in the ordinary understanding of that term, or within the meaning of the word as used in the provisions exempting lands of the state from taxation. Public policy, of course, forbids the application of general law to property held in trust for public purposes, such as public buildings, and necessary lands upon which they stand. But the rule goes no further, and whenever lands, so owned by some public

agency of mandatory of the government, are not in use in the performance of the public function, such lands, in the absence of constitutional or legislative restrictions, may justly be compelled to bear their part of the expense which goes directly to increase their values. So lands of the municipality situated within an irrigation district are not expressly exempt from assessment by such district, but there may exist an implied exemption, dependent upon the use to which the propety is put. Likewise lands of a school district which are held as an investment may be assessed for improvements the same as those of any private owner."

In *Inglewood v. County of Los Angeles,* 207 Cal. 697, 702, 707, the court said:

"There is a broad and well-recognized distinction between a tax levied for general governmental or public purposes and a special assessment levied for improvements made under special laws of a local character. (San Diego v. Linda Vista Irr. Dist., 108 Cal. 189 (35 L.R.A. 33, 41 Pac. 291); City Street Improvement Co. v. Regents, etc., 153 Cal. 776 (18 L.R.A. (N.S.) 451, 96 Pac. 801).) As to the former, that is, a tax for governmental purposes, property of a municipality is exempt therefrom by express provision of the constitution of this state and of the Political Code. (Const., sec. 1, art. XIII; Pol. Code, sec. 3607.) These provisions of the constitution and code, however, do not apply to special assessments, and property of a municipality or other property publicly owned may, under certain circumstances, be made liable for special assess-

ments. (City of San Diego v. Linda Vista Irr. Dist., supra; City Street Improvement Co. v. Regents, etc., supra; Los Angeles County Flood Control Dist. v. Hamilton, supra; City of Pasadena v. McAllaster, 204 Cal. 267 (267 Pac. 873).) The rule is aptly stated by Judge Cooley in the following language: 'While these local assessments are taxed under a taxing power, they are not taxes in the ordinary understanding of that term, and that, consequently, the usual exemptions from taxation will not preclude the property exempt being subject to them.' (Cooley on Taxation, 2d ed., p. 650.) * * *

"As we have already shown, public property of a municipality, that is, property owned by such municipality and by it devoted to public use, is liable for special assessments for public improvements only in case there is a positive legislative authority therefor. * * *"

In *State v. Columbia Irr. Dist.* (Wash.), 208 Pac. 27, 30, the court had before it this question:

"Is property sold to Stevens County for delinquent general taxes subject to future assessments for payment on principal and interest on outstanding bonds?"

The court said:

"* * * We do not see how the fact that the county's title is acquired by tax foreclosure and subsequent to the organization of the district would make the status of the property any different than that which the county may have acquired from some other source, though the district assessments then in existence are foreclosed by the lien

> for general taxes. * * * To exempt this land would in effect withdraw it from the district and nullify the provision of section 6432 referred to. The only provision made for withdrawal is by application to the board of directors. * * *
>
> "It should be noted in this connection that the receipt of water or other benefits conferred by the irrigation district is not dependent upon the payment of taxes. But all the land within the District continues to share in the benefits. We conclude that these lands are subject to future assessments."

Note, 90 A.L.R. 1137:

> "It is a general rule, to which there are but few exceptions, that a constitutional or statutory exemption from taxation is to be taken as an exemption from ordinary taxes only, and does not include special assessments for local improvements. * * *"

In the *Inglewood* case the court said, referring to the bondholders, that they purchased their bonds of the several districts with the full knowledge that the enabling acts under which the bonds were issued contained no provision authorizing the assessment of municipal property. The bondholders took their bonds subject to the statutory law, but did not contract for every judicial decision.

In *City Street Improvement Co. v. Regents of the University of California,* 153 Cal. 776, the Supreme Court had occasion to hold that an assessment for street improvement against lands held by the state

university which were not yet used for educational purposes were subject to assessment.

In *San Diego v. Linda Vista I. D.,* 108 Cal. 189, 196, the court said:

> "As we have seen, there is no express exception covering this property, and implied exemption should not be extended to property which is not held or used for municipal or governmental purposes. In Essex County v. Salem, 153 Mass. 143, it is said: 'We are of the opinion that in the absence of any express exemption of the property of counties from taxation, an exemption can be applied only when the property is actually appropriated to public uses' ".

The court also said that if the Legislature may empower a city to sell its pueblo land as in *Ames v. City of San Diego,* 101 Cal. 390,

> "no reason is perceived why the legislature may not make it liable for an assessment which is not imposed as a burden but as its proportion of the expense incurred to secure a local benefit."

In *City of Pasadena v. Chamberlain,* 1 Cal. App. (2d) 125, 133, the court said that the reason why property remains subject to assessments levied against it until paid, even though the city enters and devotes the land to public use, lies in the fact that the improvement act cited expressly subjects the land within the district to the assessments levied to pay installments due on improvement bonds. The court declared that this is not taxation of public property but merely a provision whereby the improvement district may

be created, and in this case held that the city was in the position of having consented to the assessment by entering upon and taking the land which was so assessed.

There is no showing that the land in question is used by the Fish and Game Commission for a public purpose.

The appellees will of course rely upon the *Inglewood* case. In that case the court said:

> "In their behalf we will say that no complaint has come from any of said bondholders as far as the record in this case shows. The bond holders appear to be perfectly content with the situation as it is. Neither are the landholders in any of said districts making complaint regarding the exclusion of said public lands from assessments to pay for the improvements carried on in the several districts. The point is raised by the county of Los Angeles only, the respondent herein. But conceding that respondent may properly raise the question, we are convinced that its position regarding the validity of the assessments involved herein is untenable and finds no support in the law of this state."

Thus the court was honest to admit that none of the bondholders had appeared in the action and presented their views on the subject.

If the position of appellees were carried to an extreme, it would seem that the state could buy up all the land in an irrigation district and leave the bondholders without a remedy to enforce payment by

special assessment or otherwise. In the *Inglewood* case, as already pointed out, neither the taxpayers nor bondholders were complaining about the increased burden of taxation or loss of security. The chances were very remote of any loss to the bondholders there and the tax burden very slight on the remaining taxpayers of the city. However, in the present case the loss to the bondholders of the right to assert the lien on the land is immediate and direct, and may well afford sufficient reason for the court to consider the question anew.

This point may be merely moot, for this court cannot we submit pass upon the validity of any future assessments nor nullify any already made. The Fish and Game Commission seeks to have its parcel excluded from the plan. It does not have to and did not redeem. Its title will still be bad. It will have to quiet title against the trustee if it seeks to maintain its position.

Another distinction may be found in that in the *Inglewood* case the land was bought at a time when the district was solvent and at no time were the bondholders in jeopardy of losing their money because of the city's purchase of the land for municipal purposes. Compare the present case where the state bought the lands when the district was hopelessly insolvent and the bondholders desperately needed every asset of the district.

It may well be that a bondholder assumes the risk that the state or some public agency may need a site

for a city hall or a postoffice and that land bought for that public purpose will be withdrawn from assessment to provide revenue for payment of his bonds. But the assumption becomes absurd that the bondholder expects that after the district is insolvent then the state will come in and buy up land for some purpose and claim that it should take it free of any lien.

That the State contracted with the bondholders to levy and collect assessments is shown.

The California Irrigation District Act contained a specific provision that all lands in the district shall remain liable to be assessed for the bonds. We don't know of any more inclusive statement than that all lands shall be and remain liable. Section 25219, Water Code.

V. THE COURT ERRED IN HOLDING THE LIEN OF THE ASSESSMENT LEVIED FEBRUARY 6, 1945 BECAME EFFECTIVE THE FIRST MONDAY IN MARCH, 1945.

To review briefly the facts, we have shown in the Statement of the Case that the assessment was merely a supplemental assessment. The original assessment made by the Board of Supervisors was for the year 1943-44, and was made about a year previously, and omitted the lands of Dakin Bros. (now the State's lands). The supervisors undertook to levy a supplemental assessment. This was not only pursuant to the order of the court but was pursuant to Section 26500 of the Water Code of the State of California, which reads as follows:

> "If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board."

Proceedings for this assessment which may be said to be for the year 1944 were commenced December 14, 1944 (R. 16). The assessments were equalized January 2, 1945 and the assessment was actually levied on February 6, 1945 (R. 17).

Now the question involved under this point is whether the lien of this assessment relates back to the first Monday in March, 1944, which would be prior to the time that the state took title to the property in August 1944, or whether the assessment levied in February of 1945 did not become a lien until the first Monday in March, 1945.

Appellants refer to the sections of the Water Code, Sections 26500-26529, which are set forth in the Exhibit A as showing the procedure which is supposed to take place when the board of directors of an irrigation district fails to levy an assessment. It will be seen from perusal of these sections that the supervisors are required to levy the assessment upon the failure of the board of directors of the irrigation district. It will also be seen that all acts of the supervisors are in truth and in fact the assessment of the board of directors of the irrigation district and are

done "with the same effect". (Section 26500 Water Code. See Exhibit A.)

It is quite obvious that if the board of directors of an irrigation district fail to make their assessment in the time required by the statute, the supervisors, if they follow normal routine would not be able to get the assessment performed or done until perhaps after January 1st, but it would nonetheless be the assessment for the year 1944. Section 26079 of the Water Code provides:

> "If any duty relating to the assessment, levy, and collection of assessments is performed subsequent to the latest time it should have been performed, the time within which all duties consequent upon the performance of the preceding duty are to be performed shall be extended to allow the elapsing of the intervals required to elapse between the performance of the duties, and assessments shall not become delinquent for at least 30 days after the first publication of notice that the assessments are due and payable."

It is thus seen that the time for performance of the various steps in the assessment and levy are *advanced* so as to give *like effect* as if done in the time specified originally.

Interpretation of the statute.

The vital section of the Water Code involved is Section 25925 which reads as follows:

> "The annual district assessment upon land is a lien against the property assessed from and after

> the first Monday in March of the year in which the assessment is levied."

The court in its order stated that the term "year" should be given its common and usual definition of a calendar year, and states that throughout the Water Code references made to a "calendar year" are persuasive in construing the word "year" to mean a "calendar year". (R. 46.)

It is true that the Water Code provides that the annual assessment is to raise moneys for the calendar year (Water Code Section 25650-2), while the Revenue and Taxation Code of the State of California provides for levies for the fiscal year. The word "assessment year" appears, however, in Section 25801 of the Water Code, and thus in referring to the mechanics of making the levy, it may be quite apparent that the year of enforcement is different from the year for which the levy is made to produce the funds.

It is obvious that the Water Code is not the exclusive source of law to which we are to look in matters concerning irrigation districts. Section 117 of the Revenue and Taxation Code of the State of California reads as follows:

> "'Lien date'. 'Lien date' is the time when taxes for any fiscal year become a lien on property."

Now it would hardly be said that that section does not refer to and define the lien date set forth in Section 25925 of the Water Code.

Section 118 of the same code reads as follows:

> "'Assessment year'. 'Assessment year' means the period beginning with a lien date and ending immediately prior to the succeeding lien date for taxes levied by the same agency."

This is entirely reasonable and we submit that it is a binding statement of law construing the meaning of the words "assessment year". It is therefore justifiable to argue that the assessment levied between the first Monday in March, 1944 and the first Monday in March 1945 would be a lien on the land from and after March, 1944.

There are two other sections in the Revenue and Taxation Code which are pertinent. Section 2192 reads as follows:

> "All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied."

Section 24 reads as follows:

> "No act in all the proceedings for raising revenue by taxation is illegal on account of informality or because not completed within the required time."

Thus we have a positive declaration that the proceedings commenced in 1944 for the levying of these assessments upon the lands of the state, although the levy was not completed until 1945, should not be illegal on account of that informality, or because not completed within the required time which would be supposedly 1944.

Attention is called to the fact that the assessment proceedings were commenced by the County of Lassen under the provisions of Section 26500 of the Water Code which provides that if a board of an irrigation district neglects to carry out its duties of levying assessments "in any year" the board of supervisors shall perform the duties "in the same manner and with the same effect as if they had been performed by the board". Now it is perfectly obvious that a board of supervisors could not complete performance of such duties so as to levy the tax within the year let us say 1944 after the failure and neglect of the board of directors of the district to carry out its duties. Yet Section 26500 provides that it shall do so "with the same effect as if they were performed by the board". This section is persuasive that the intent of the section with relation to the lien date was that the word "year" should apply to the year from the first Monday in March, 1944.

The present assessment was levied February, 1945, so it is obvious that the lien which went into effect the first Monday in March, 1945, does not refer to the assessment which had already been levied. The assessor is supposed to assess all lands between March and June. The court's construction would leave two months when no assessment could be made except to relate to the following March lien.

In the present case the February assessment could not possibly relate to the year 1946 because no current assessment for the calendar year 1946 was yet due, and the assessor and board were not authorized

to make any for then but only for the year 1945. No default had yet been made by the board of directors as to the 1946 assessment.

It is our position that the assessment year runs from March to March, although the assessment made is for the calendar year following.

City of Santa Monica v. Los Angeles County, 15 Cal. App. 710, 115 P. 945. That was an action brought to recover taxes paid under protest. The property assessed was privately owned property on March 1, 1903. Thereafter, but before such assessment was levied, the city of Santa Monica acquired said property. The court held with the defendant in said action that the lien of said taxes attached on the first Monday in March of said year and that "the plaintiff, when it acquired this land, took it subject to the lien for county purposes to the same extent as would a private purchaser". If a city must pay county taxes on property bought after the first Monday in March but before the assessment is levied, it would seem to follow that the state should do likewise.

See

U. S. v. Aho, 68 Fed. Sup. 359 and *U. S. v. Florea,* 68 Fed. Sup. 367.

If objection is made that the assessment and levy were not made at the normal time of year, perhaps the validating act of 1945 cured any such possible defect. See Chapter 1134, Stats. 1945, reading in part as follows:

"Section 1. As used in this act 'Taxing agency' includes the State, county, and city. 'Taxing agency' also includes every district that assesses property for taxation purposes and levies taxes or assessments on the property so assessed.

Sec. 2. As used in this act 'Revenue district' includes every city and district for which the county officers assess property and collect taxes or assessments.

Sec. 3. Every act and proceeding heretofore taken by any taxing agency or revenue district or the officers thereof relative to the preparation, transmitting, computing, determining or fixing the budget or the tax rate or rates of any taxing agency or revenue district, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances, are hereby confirmed, validated and declared legally effective."

In the case of *United States v. State of Alabama,* 313 U.S. 274, 61 S. Ct. 1011, Mr. Chief Justice Hughes, speaking for the Supreme Court, said:

"There is no question, however, as the government concedes, that the state statute purports to impose a lien as of October 1, 1936 for the taxes which by the process of assessment were to be made payable for the tax year 1937. October first is fixed as the tax day, and as of that day owners are to make their returns, values are to be fixed and the taxes laid. There is no question that the State thus undertakes to create an inchoate lien upon the lands as of the tax day, a lien which is to be effective for the amount of the taxes

for the ensuing year as these are fixed by the defined statutory method."

The court holds:

"We make no exception of the tract conveyed to the United States on the tax day, October 1, 1936, as we think the state statute, as contended by the State, is to be deemed effective from the moment the tax day began."

An attempt to wipe out this lien would be to deny to the creditors of the state, the bondholders in this case, a vested right to property.

We refer to an official opinion on file with the Irrigation Districts Association of California and given by counsel for the South San Joaquin Irrigation District July 24, 1941 in a non-controversial matter. We have copied portions of this opinion and set them forth in Exhibit B attached hereto and have italicized the most pertinent portions showing the opinion of counsel that the lien date refers to the tax levied for the *following calendar year* and citing and relying upon Section 2192 of the Political Code. (The opinion refers to sections in the former "the California Irrigation District Act" which was codified into the Water Code in 1943.)

We respectfully submit that the assessment levied by the irrigation district became a lien on the land in question on the first Monday in March, 1944, and that when the Fish and Game Commission acquired this property it took it subject to the lien of those assessments.

CONCLUSION.

It is respectfully submitted that the decision below should be reversed.

Dated, Turlock, California,
November 8, 1948.

W. COBURN COOK,
Attorney for Appellants.

(Exhibits A and B Follow.)

Exhibits.

EXHIBIT A

Water Code, Section 26500:

"If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board.

26501. The applicable part of the equalized county assessment rolls of the affected counties shall be the basis of assessment for the district when its assessments are levied pursuant to this article.

26502. If any land subject to assessment for the purposes of the district does not appear upon a county assessment roll used as the basis of assessment for the district, the land omitted shall be forthwith assessed by the county assessor of the county in which it is situated upon an order of the board of supervisors making the assessment, and a description of the property omitted shall be written in the roll prepared for the district assessments.

26503. The board of supervisors shall meet and equalize each assessment made pursuant to this article with the assessment of other land in the district. The same notice shall be given by the board of supervisors of a meeting for the purpose of equalizing the assessment to be made as herein directed as is provided to be given by a district secretary when a board is to meet to equalize assessments.

26504. All expenses incurred in levying the assessment shall be borne by the district concerned. Unless the expenses are paid within 60 days from the time when a demand for them is made, they shall be collected by an action commenced by the district attorney of the county whose board of supervisors prepared the assessment roll.

26525. In case of the neglect or refusal of the collector of any district to perform the duties imposed upon him, the tax collector of the office county shall perform his duties and be accountable therefor upon his official bond.

26526. When any county tax collector collects any assessments for any district, he shall pay the proceeds to the county treasurer of the office county.

26527. As to money collected by the county tax collector and paid to the county treasurer, the county treasurer shall perform the duties ordinarily imposed on the treasurer of a district and be accountable therefor upon his official bond.

26528. The county treasurer shall place the money of the district in a special fund to the credit of the district and shall disburse it to the proper persons for the purposes for which the assessments raising it were levied.

26529. The county treasurer shall not pay any part of the money to the treasurer of the district until the county treasurer is satisfied that all of the valid obligations for which the assessments were levied and for which payment has been demanded have been paid.

EXHIBIT B

Law Offices of
RUTHERFORD, JACOBS, CAVALERO
& DIETRICH
Stockton Savings & Loan Bank Building
Stockton, California

July 24, 1941

Mr. F. S. Thornton
Assessor-Collector
South San Joaquin Irrigation District
Escalon, California

Re: Delinquent Assessment Notice.

Dear Mr. Thornton:

* * * * * * *

Our conclusion from all of the above is that the form of notice for the delinquent assessment list which you left with us, and which we are herewith returning to you, is adequate and sufficiently complies with Section 42 of the Irrigation District Act, with the exception, however, that the word "fiscal" in the sixth line of the notice should be changed to the word "calendar". We can find no reference anywhere to the statute which you said is supposed to exist which fixes some particular period as the "fiscal" year for an irrigation district. On the contrary, Section 39 of (Ch. 2 Art. of Part. 10, Div. II, W.C.) the Irrigation District Act, which appears to be the controlling section with reference to the levy of assessments by an irrigation district, refers solely to "the next ensuing calendar year", and there does not seem

to be any room left for any interpretation that the assessment that is levied is for any other period other than "the next ensuing calendar year". Inasmuch as Section 39 uses the word "calendar" throughout, and inasmuch as the word "fiscal" is generally used in connection with the establishment of a year other than a calendar year, we believe that it would lead to possible confusion if the word "fiscal" is used.

There does exist, however, in the law of California, a constitutional definition of the term "fiscal year" and it may be that in the discussions that you have heard reference was being made to this definition. It is Article XX, Section 5 of the Constitution of California and reads as follows:

> "*The Fiscal Year.* The fiscal year shall commence on the first day of July."

However, it has been held that the mere fact that a statute designates the fiscal year as ending on some other date does not render the statute void where the intent was to refer to the period when the assessor should commence assessing property for taxes. (See People v. Todd, 23 Cal. 181.) In the case cited, it was held that an act legalizing assessments for taxes for the fiscal year ending on the 1st day of March is not void because the constitution provides that the fiscal year shall commence on the 1st day of July, but that the word "fiscal" in the act may be treated as surplusage. In our problem, we have a specific act, to wit, the California Irrigation District Act, which regulates our assessment procedure. Section 39 of that act which sets up the period for

which the assessment is to be levied states that it shall be for the "next ensuing calendar year". It appears to us, therefore, that, for our purposes, we are governed by the Irrigation District Act which sets up our specified procedure rather than by the definition of a fiscal year which appears in the constitution and inasmuch as the specific law which controls us describes our period as a "calendar year", we believe that for the sake of consistency and in order to avoid confusion, we should in our notices refer to said period as "calendar year" as provided in Section 39.

* * * * * * *

As a matter of interest, because it all came up in our discussion, we might review with you our understanding of the assessment procedure. Section 35 of the Irrigation District Act states that the assessor must between the first Monday in March and the first Monday in June of each year assess all land in the District in the manner in said section set forth. Thereafter, as provided in Section 37 of the Irrigation District Act, on or before the first Monday in August in each year the assessor must complete his assessment book and deliver it to the Secretary of the Board who must immediately give notice thereof and of the time when the Board of Directors will sit as a Board of Equalization by publication at least two times in a newspaper in the County in which the office of the district is located. Said notice shall be published at least twenty days, and not more than thirty days, before the time fixed for the meet-

ing of the Board of Directors as a Board of Equalization. Thereafter, pursuant to Section 38 of the Irrigation District Act, the Board of Directors upon the date specified in the aforesaid notice meet as a Board of Equalization and continue in session from time to time as long as may be necessary, not to exceed ten days, exclusive of Sundays, to hear and determine any objections to the valuation, acreage, or any matter pertaining to the assessment that may come before them and the Board may make such changes thereof as may to them seem just. The Secretary of the Board shall be present during its session as a Board of Equalization and make all changes ordered in the assessment book and within ten days after the close of the session he shall have the total values as finally equalized by the Board extended into columns and added.

Thereafter, pursuant to Section 39 of the Irrigation District Act, the Board of Directors shall within fifteen days after the close of its session as a Board of Equalization levy an assessment upon the lands within the District in an amount sufficient to meet the purposes specified in said Section 39.

Pursuant to Section 40 of the Irrigation District Act, the assessment upon land is a lien against the property from and after the first Monday in March for any year. This we interpret to refer to March of the year in which the assessment is levied. In other words, the assessment which will be levied by your Board of Directors in the near future for the purposes of the District throughout the year 1942 is

a lien against the property assessed from and after the first Monday of March in 1941. This necessarily follows due to the fact that pursuant to Section 41 of the Irrigation District Act the whole assessment, or when proceeding under Section 41c of said act when the first installment of said assessment, will become delinquent on the last Monday of December, 1941 and obviously it would be impossible for the assessment to become delinquent if it were not already a lien, so the reference to March in Section 40 necessarily must mean, in the example given, March, of 1941, that being the year in which the assessment is made, and not March of 1942, which is the year that the assessment made covers.

* * * * * * *

With kindest regards, we are,

Very truly yours,

Rutherford, Jacobs, Cavalero & Dietrich

PC:BG By Philip Cavalero

P. S. In addition to what we have already hereinabove set forth, there is another good reason which, in our opinion, is conclusive and permits you to disregard the definition of a fiscal year set forth in Article XX, Section 5 of the Constitution of California. This reason is based upon the language contained in Article XI, Section 13 of the California Constitution, which, after stating that the legislature shall not delegate certain powers to certain agencies, specifically excepts irrigation districts, reclamation districts and drainage districts and states that as to such districts the legislature shall have the power to

provide for their supervision, regulation and conduct in such manner as it may determine. From this, it follows that the legislature has the authority to enact the California Irrigation District Act and to provide in said act fully and completely for the supervision, regulation and conduct of the affairs of an irrigation district. In view of the fact, therefore, that the legislature has so acted and has provided the irrigation district with a specific law to follow, it seems conclusive that the law which the irrigation district must follow is the law which the legislature has constitutionally provided for it, which in our case brings us back to the point that in so far as an irrigation district is concerned its tax year is the calendar year specified in Section 39 of the Irrigation District Act.

Article XI, Section 13 of the California Constitution reads as follows:

> "The legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments or perform any municipal function whatever, except that the legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state. (Amendment adopted November 3, 1914)."

Also, as a further conclusive argument for our conclusion hereinabove expressed that your assessments attach as a lien against the property in March of the year preceding the year for which said assessments are levied, we call your attention to Section 2192 of the Revenue and Taxation Code which states as a general principle that all tax liens attach annually in March preceding the fiscal year for which said taxes are levied. The fact that in the Irrigation District Act we have no reference to a "fiscal" year but rather to a "calendar" year is immaterial. They both mean the same thing, to wit, the year for which the tax is levied. Section 2192 of the Revenue and Taxation Code reads as follows:

> *"All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied. (Enacted 1939)."*

P. C.